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Supreme Court, U.S.
FILED

No. 08- 08-717 DEC 1 - 2008

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

GJINAL and EVELINA VEIZAJ,

Petitioners,

v.

MICHAEL B. MUKASEY,
United States Attorney General,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Court of Appeals erred in determining the BIA's decision not to extend the time to appeal was grounded in the BIA' lacking power to extend the filing deadline?

Whether the Court of Appeals lacked jurisdiction to review the BIA's determination that it would not allow petitioners to file out-of-time because of petitioners' purported lack of due diligence because such a ruling by the BIA was "discretionary".

PARTIES TO THE PROCEEDING

The caption of the case contains all the names of the parties involved in this matter. No corporation, parent corporation or subsidiaries exist in this litigation.

AFFECTED NON-PARTIES

Two native born minor children, both United States Citizens by reason of their birth in this Country will be affected by the outcome of this case.

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Rules:

Appellate Division First Department Rule § 603.13(d) 3

Supreme Court Rule 13.1 1

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Other Authority:

118 Cong. Rec. 7168 (1972) 5

Petitioners respectfully petition for a writ of certiorari to review the judgment to the United States Court of Appeals for the Second Circuit.

OPINION BELOW

The September 2, 2008 unpublished decision of the United States Court of Appeals for the Second Circuit, *Veizaj v. Mukasey*, Nos. 07-1330; 07-3824, is produced as Appendix A.

JURISDICTIONAL STATEMENT

The Court of Appeals had jurisdiction over this case pursuant to 8 U.S.C. § 1252. The petition for a writ of certiorari is timely filed in accordance with Supreme Court Rules 13.1 and 13.3.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

The Court has jurisdiction to hear "due process" challenges to the conduct of immigration proceedings. *E.g.*, *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. V.

STATEMENT OF THE CASE

Note: The Loss of the Agency's Record of the proceedings held In this case of necessity abbreviates the Statement of the Case

Petitioners are Albanian nations who have resided in the United States for thirteen (13) years and have two (2) minor children born in the United States who are natural citizens and holders of U.S. Passports. The eldest child is thirteen years of age.

Petitioners, who arrived legally in this country through J.F. Kennedy Airport in New York, in 1994, sought asylum here and a proceeding was conducted the decision of which appears to be one of the few papers that are extant memorializing that matter. (*See* Appendix E). The Immigration Judge found that petitioner Gjinal Veizaj's testimony – the sole evidence – failed to establish a basis for granting asylum or the withholding of removal. (Appendix E, 26a).

Petitioners sought review of the Immigration Judge's determination (Appendix E) by hiring their immigration trial counsel Martin Vulaj to file and complete an appeal to the Board of Immigration appeals. Petitioners, in 2004, learned for the first time that (a) a Notice of Appeal had not been filed by counsel; and (b) that Vulaj, had been disbarred by Order of the Supreme Court Appellate Division of New York's First Department. Vulaj, as a disbarred lawyer, had a positive duty[1] to inform his clients but, at all times material, Vulaj concealed both his disability and the fact he had not filed an appeal for petitioners.

1. Appellate Division First Department Rule § 603.13(d).

Petitioners, upon finally penetrating Vulaj's veil of fraud and deception and discovering the truth, sought to file a late notice of appeal and that application was denied as untimely. (Appendix D at 14a). Petitioners appealed to the Second Circuit Court of Appeals and, by Stipulation, the matter was remanded back to the BIA so as to address the holdings in *Zhong Guang Sun v. U.S. Dept. of Justice*, 421 F.3d 105 (2nd Cir. 2005) and *Iavorski v. U.S. INS*, 232 F.2d 124 (2nd Cir. 2000). (Appendix C p. 10a).

The BIA again rejected petitioners application to file a late notice of appeal and have the case decided on the merits by finding the petitioners did not exercise due diligence and had discovered the fraud practiced on them too long after, according to the BIA, they should have done. (Appendix C at pp. 11a, 12a).

Again petitioners sought redress in the Second Circuit Court of Appeals only to have their petition dismissed. (Appendix "A"). The Court of Appeals held that the BIA's decision was "wholly discretionary" and therefore not reviewable. (Appendix A, p. 3a).

REASONS FOR GRANTING THE PETITION

The Court of Appeals failed to truly review the merits of petitioners' claims, ignored the errors, omissions and frauds practiced upon them by their disbarred attorney both before and after his disbarment and penalized them for not discovering that a fraud had actively been practiced upon them. Petitioners were held to a standard that, under the facts, could not be satisfied and the Court of Appeals failed to carry out its judicial role in evaluating the actions of the BIA.

It is understandable that petitioners would accept whatever lulling was done by Vulaj and his office when the Government, after the issuance of the first decision finding petitioners deportable, continuously renewed their work permits long after they were denied asylum. In this time-period petitioners achieved the American dream as property owners and their American citizen children cemented their relationship with their country — America.

Petitioners and their U.S. citizen minor children are being barred from meaningful review of their asylum claim because they failed to penetrate the fraud perpetrated by their lawyer under the assumption — made in the total absence of fact — that they should have discovered that a fraud was being practiced upon them. It would appear that the standard petitioners failed to satisfy is that they (a) investigate the bona fides of their lawyer; and (b) investigate the filings made on the public record. This standard is harsh in the extreme as employing a lawyer is, in the overwhelming majority of cases, a means to handle problems and issues that

lay people are ill-equipped to fully comprehend. The BIA is, in effect, demanding that "due diligence" mean going behind the back of the representations of counsel and wander the legal maze alone and that failing to do robs petitioners of their day in court despite the fraud practiced upon them.

1. The Use Of Discretion Does Not Render A Decision Unreviewable

A decision based upon the exercise of discretion "hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975), cited with approval, *Gall v. United States*, 128 S. Ct. 586, 607 (2007).

The essence of fraud and deception is that it not be discoverable and fraud sometimes has an extensive shelf-life particularly when the perpetrator is a figure of trust and a minister of the mysteries of the law. This is especially true for immigrants wary of officialdom who look to go-betweens and place faith in them. The Court of Appeals has "wide discretion" to achieve fairness. 118 Cong.Rec. 7168 (1972), quoted with approval, *Albermarle Paper Co. v. Moody*, *supra*, at 421; *see also United States v. Taylor*, 487 U.S. 326, 336 (1988). Further, "discretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles.' " *Id.*, *Albemarle Paper Co. v. Moody*, *supra*, at 416, *quoting United States v. Burr*, 25 F.Cas. 30, 35 (No. 14,692d) (CC Va. 1807) (Marshall, C.J.).

2. The Court of Appeals Misapprehended Its Authority

The most extensive and corrupt schemes may not be discovered within a stated time to bring an action and the fraud may remain concealed long after its perpetration. A literary example immediately comes to mind in the case of the Nineteenth Century forger of Victorian first editions Thomas J. Wise. He successfully created and for forty years maintained that a group of over 100 books he created were true first editions until scientific analysis demonstrated his fraud. Against Wise's frauds a mere three (3) years between the perpetration and the unmasking of Vulaj hardly seems excessive. It is understandable that petitioners would created whatever lulling was done by Vulaj and his office when the Government, after the issuance of the first decision finding petitioners deportable, continuous renewed their work permits long after they were denied asylum. In this time-period petitioners achieved the American dream as property owners and their American citizen children cemented their relationship with their country — America.

The Quagmire of Procedure and Time

Petitioners have resided, without incident, in this country since at least 1994, bought property, paid taxes and are rearing two (2) American children in the only land those

children know. Petitioners have been sunk in the quagmire of the justice system and betrayed and abandoned by the defalcations of disbarred lawyer Martin Vulaj for it is from his defaults, concealments and breaches of duty that petitioners find themselves hobbled and near stepping to on a plane back to Albania and their American citizen minor children.

Catch 22

It is beyond dispute that petitioners did not timely file a Notice of Appeal from the initial adverse determination. It is also indisputable that petitioners had counsel who adopted the duty of filing such a Notice of Appeal and that counsel, as a part of a now established pattern of neglect that led to disbarment, failed – likely intentionally – to timely note the appeal.

Un-vetted Determination

The Government's position is that the original determination should be deemed "final" and that petitioners should be chargeable with counsel's defalcations, that they failed to pursue their matter with due diligence, i.e., that they left it in counsel's hands, believed counsel or his office's misrepresentations as to the status of their case. However, the Government must shoulder its responsibility for fostering petitioners'

misbelief. The actions of the Government in renewing their work-permits throughout did nothing other than to foster a belief that their deportation order was being reviewed.

Decision on the Merits Impossible

Review of the original denial of asylum has been frustrated by the loss by the agency of the hearing record denying these petitioners the possibility of an appeal in the first instance granted them by statute without regard to the various instances of misconduct by their disbarred lawyer.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioners

APPENDIX

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED SEPTEMBER 2, 2008

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Nos. 07-1330-ag (L);
07-3824-ag (Con)
NAC

GJINAL AND EVELINA VEIZAJ,

Petitioners,

v.

MICHAEL B. MUKASEY, UNITED STATES ATTORNEY GENERAL,[1]

Respondent.

SUMMARY ORDER

Present PIERRE N. LEVAL, ROSEMARY S. POOLER, and RICHARD C. WESLEY, *Circuit Judges.*

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1. Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Michael B. Mukasey is automatically substituted for former Attorney General Alberto Gonzalez as the respondent in this case.

Appendix A

UPON DUE CONSIDERATION of these petitions for review of a Board of Immigration Appeals ("BIA") decision, it is hereby ORDERED, ADJUDGED, AND DECREED, that the petitions for review are DISMISSED.

Petitioners, natives and citizens of Albania, seek review of an August 7, 2007 order of the BIA denying their motion to reconsider its March 9, 2007 decision denying as untimely their appeal of the Immigration Judge's decision. *In re Veizaj, Gjinal and Evelina*, Nos. A73 566 992/993 (B.I.A. Aug. 7, 2007). We assume the parties' familiarity with the underlying facts and procedural history in this case.

In its denial of Petitioners' untimely appeal, the BIA found that it lacked authority to extend the 30-day period to file an appeal of the IJ's denial of asylum, withholding of removal, and CAT relief. *See* 8 C.F.R. § 1003.38(b); *Matter of Liadov*, 23 I. & N. Dec. 990, 991-93 (BIA 2006) (finding that it lacked authority to extend the filing deadline in light of governing regulations, the statute, and the Supreme Court's admonition that filing deadlines be strictly applied). The BIA declined to certify Petitioners' appeal pursuant to 8 C.F.R. § 1003.1(c) due to the three year-delay in Petitioners' discovery of their former attorney's misconduct in failing to file their Notice of Appeal of the IJ's decision. *See Zhong Guang Sun v. U.S. Dep't of Justice*, 421 F.3d 105 (2d Cir.2005)(finding that although the requirement that an alien file a notice of appeal to the BIA within 30 days of the IJ's decision is "mandatory and

jurisdictional," the BIA may consider an untimely appeal in " 'unique or extraordinary circumstances' "). Because Petitioners do not challenge the BIA's finding that it lacked authority to extend the filing deadline, we decline to review that determination. *See Yueqing Zhang v. Gonzales*, 426 F.3d 540, 546 n. 7 (2d Cir.2005) (emphasizing that issues not sufficiently argued in the briefs are considered waived and ordinarily will not be addressed on appeal).

Petitioners' motion to reconsider provided additional details regarding their claim that they exercised due diligence in pursuing their appeal. However, reviewing the BIA's denial of the motion to reconsider would require us to evaluate the BIA's underlying determination that Petitioners' lack of due diligence in pursuing their appeal mitigated against taking their appeal on certification, a determination that was "entirely discretionary." *See Azmond Ali v. Gonzales*, 448 F.3d 515, 517-18 (2d Cir.2006) (finding that the BIA's determination regarding exercise of its sua sponte authority to consider an untimely motion to reopen or reconsider was unreviewable because it is "entirely discretionary"); *see also Liadov v. Mukasey*, 518 F.3d 1003, 1011 (8th Cir.2008) (finding that the BIA's refusal to "self-certify" was an "unreviewable action committed to the agency's discretion"); *Mahamat v. Gonzales*, 430 F.3d 1281, 1284 (10th Cir.2004) (finding no jurisdiction to review the BIA's certification decision and noting the lack of any standards to judge the BIA's exercise of discretion). Because we cannot review such discretionary determinations, we cannot review the BIA's denial of Petitioners' motion to reconsider. *Cf. Azmond Ali*, 448 F.3d at 517-18.

Appendix A

For the foregoing reasons, the petitions for review are DISMISSED. Any pending motion for a stay of removal in these petitions are DISMISSED as moot.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: _____

APPENDIX B — DECISION OF THE BOARD OF IMMIGRATION APPEALS OF THE U.S. DEPARTMENT OF JUSTICE DATED AUGUST 7, 2007

U.S. DEPARTMENT OF JUSTICE
Executive Office for Immigration Review
Falls Church, Virginia 22041
Decision of the Board of Immigration Appeals

Date: August 7, 2007

Files: A73 566 992 – New York, NY
A73 566 993

In re: GJINAL VEIZAJ
EVELINA VEIZAJ

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENTS:
Glenn H. Bank, Esquire

ORDER

PER CURIAM. This proceeding has had an extended procedural history. On May 11, 2005, we dismissed as untimely the respondents' March 5, 2004, appeal of an Immigration Judge's January 8, 2001, decision denying their applications for asylum, withholding of removal, and protection under the Convention Against Torture, and granting them

voluntary departure. The respondents filed a timely petition for review. Pursuant to a stipulated order from the United States Court of Appeals for the Second Circuit, the proceeding was remanded with instructions to issue a new decision addressing *Zhong Guang Sun v. U.S. Dept. of Justice*, 421 F.3d 105 (2d Cir. 2005) and *Iavorski v. U.S. INS*, 232 F.2d 124 (2d Cir. 2000).

We issued a decision on March 9, 2007, finding that there was no authority in the statute or the regulations to extend the appeal period. We recognized that under exceptional circumstances, the Board may certify a case to itself pursuant to 8 C.F.R. § 1003.1(c). We found, however, that the respondents failed to show exceptional circumstances because they did not demonstrate the requisite due diligence. *See e.g. Cekic v. INS*, 435 F.3d 167, 170 (2d Cir. 2006) ("[N]o matter how egregiously ineffective counsel's assistance may have been, an alien will not be entitled to equitable tolling unless he can affirmatively demonstrate that he exercised reasonable due deligence during the time period sought to be tolled.")

On April 2, 2007, the respondents filed a timely motion to reconsider. 8 C.F.R. § 1003.2(b)(2). To grant a motion to reconsider, the respondents must identify a material error of fact or law in our prior decision. *See Matter of O-S-G-*, 24 I&N Dec. 56 (BIA 2006). The motion is denied because the respondents have failed to identify any material error of fact or law in our prior decision.

Appendix B

In support of their motion, the respondents attached additional evidence, including their affidavits, copies of employment authorization cards, some of which were issued after the Immigration Judge's decision was final, and evidence that their former attorney resigned from the bar for disciplinary reasons. To the extent that the respondents' motion is a motion to reopen, the motion is denied because the additional evidence could have been presented prior to our March 9, 2007, decision, but was not. 8 C.F.R. § 1003.2(c)(1).[1] Further, the additional evidence does not demonstrate due diligence. It was the respondents' responsibility to provide supporting evidence for renewal of employment authorization, such as a "copy of the document issued by the Board of Immigration Appeals to show that a timely appeal has been filed from a denial of the asylum application by the Immigration Judge." 8 C.F.R. § 1208.7(c)(2) and (d). *See also* 8 C.F.R. §§ 1208.7(b), 1274a.12 and 1274a.13. The respondents admit in their affidavit that they applied for extensions after the

1. Section 1003.2(c)(1) provides that "[a] motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." Evidence of former counsel's ineffective assistance of counsel could not have been presented to the Immigration Judge because the alleged ineffective assistance occurred after the Immigration Judge issued his decision. However, some of the evidence was available as soon as the respondents obtained a renewal and extension of their work authorization after the Immigration Judge's decision, and could have been presented at a much earlier time during proceedings.

Immigration Judge denied relief, but have not shown what documentation they provided to the Department of Homeland Security to obtain the extensions (Motion, Exh. A, para. 5). If they had attempted to obtain the proper documentation—a copy of the document issued by the Board evidencing a timely filed appeal—they would have known at a much earlier date that their appeal was not properly preserved. Under these circumstances, the additional evidence does not demonstrate the requisite due deligence. Accordingly, the motion is denied.

s/ [illegible]
FOR THE BOARD

APPENDIX C — DECISION OF THE BOARD OF IMMIGRATION APPEALS OF THE U.S. DEPARTMENT OF JUSTICE DATED MARCH 9, 2007

U.S. DEPARTMENT OF JUSTICE
Executive Office for Immigration Review
Falls Church, Virginia 22041
Decision of the Board of Immigration Appeals

Date: March 9, 2007

Files: A73 566 992 – New York
A73 566 993

In re: GJINAL VEIZAJ
EVELINA VEIZAJ

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS:
Glenn H. Bank, Esquire

CHARGE:

Order: Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(1)(B)] — In the United States in violation of law (both respondents)

This matter was last before us on May 11, 2005, when we dismissed as untimely the respondents' March 5, 2004, appeal of an Immigration Judge's January 8,

2001, decision denying their applications for asylum, withholding of removal, and protection under the Convention Against Torture, and granting them voluntary departure. The matter is before us now on a stipulated order of remand by the United States Court of Appeals for the Second Circuit, instructing us to issue a new decision addressing *Zhong Guang Sun v. U.S. Dept. of Justice*, 421 F.3d 105 (2d Cir. 2005) and *Iavorski v. U.S. INS*, 232 F.2d 124 (2d Cir. 2000).

In *Zhong Guang Sun v. U.S. Dept. of Justice*, the Court reasoned that the Board may hear late-filed appeals under unique or extraordinary circumstances. *See* 421 F.3d at 108. The Court determined that a notice of appeal that was sent via an overnight delivery service the day before the filing deadline, but arrived 5 days late as a result of the delivery service's error, could constitute the sort of extraordinary circumstance that would warrant the Board's consideration of an untimely appeal. *Id.* at 111.

The Second Circuit held in *Iavorski v. U.S. INS* that the filing deadline governing motions to reopen may be equitably tolled to accommodate claims of ineffective assistance of counsel. *See* 232 F.2d at 134. In that case, however, the Court determined that equitable tolling was unavailable to the alien because he had not exercised due diligence, since he should have discovered that his counsel had failed to file a notice of appeal with the Board before the end of the 2-year period he sought to toll. *See id.*

Appendix C

We have interpreted the regulations governing appeals to the Board, the statute governing administrative appeals in asylum cases, and Supreme Court authority to require that filing deadlines be strictly enforced and that appeals be timely filed. *See Matter of Liadov*, 23 I&N Dec. 990, 993 (BIA 2006). We find no authority in the statute or the regulations to extend the appeal period. *See id.* We recognize, however, that under exceptional circumstances, the Board may certify a case to itself pursuant to 8 C.F.R. § 1003.1(c) (2006). *See id.*

In the instant case, the respondents in their March 5, 2004, motion asked us to accept their untimely appeal because, they alleged, they retained former counsel to file the appeal and were unaware "until recently" that counsel had not done so. *See* Motion to Accept Late Filing of Notice of Appeal. They attested that their former counsel had withdrawn from the practice of law because of complaints filed against him, and that they were precluded from filing a complaint against him because he was no longer a licensed attorney. *See id.* However, the respondents' motion offers no indication of any efforts that they made to contact former counsel between the January 8, 2001, issuance of the Immigration Judge's decision and the March 5, 2004, filing of the motion. In fact, the respondents simply state that they only recently learned that no appeal had been filed on their behalf. As the Second Circuit noted in *Iavorski v. U.S. INS*, *supra*, a party exercising due diligence would have discovered within 2 years that retained counsel had failed to file his or her appeal. Here, the respondents waited more than 3 years before

checking on the status of their appeal and realizing that no appeal had been filed. Thus, even if we had authority to equitably toll the appeal period, under the standard set forth in *Iavorski v. U.S. INS*, the respondents have not demonstrated the requisite due diligence to warrant equitable tolling of the 30-day appeal filing deadline.

Further, while ineffective assistance of counsel may also constitute the type of extraordinary circumstances contemplated by *Zhong Guang Sun v. U.S. Dept. of Justice* that the Second Circuit held would warrant consideration of an untimely appeal, the present circumstances do not fall within that ambit. It is reasonable to expect a party seeking exceptional relief to have made at minimum a timely effort to monitor the progress of his or her appeal, and in so doing, to have discovered counsel's inactivity within a much shorter period of time than the 3 years taken by the respondents. Ineffective assistance of counsel may create an extraordinary circumstance, but a delay of 3 years in uncovering the substandard representation due to inaction mitigates against the exercise of an exceptional remedy. If in fact it was within our power to consider an untimely appeal under extraordinary circumstances, those circumstances are not present here.

In light of the respondents' lack of due diligence in pursuing their appeal with former counsel, and the 3-year delay in their request for reconsideration of an

untimely appeal, we decline to consider the case on certification pursuant to 8 C.F.R. § 1003.1(c). Accordingly, we will again dismiss the appeal as untimely.

ORDER: The appeal is dismissed.

s/ [illegible]
FOR THE BOARD

APPENDIX D — DECISION OF THE BOARD OF IMMIGRATION APPEALS OF THE U.S. DEPARTMENT OF JUSTICE DATED MAY 11, 2005

U.S. DEPARTMENT OF JUSTICE
Executive Office for Immigration Review
Falls Church, Virginia 22041
Decision of the Board of Immigration Appeals

Date: May 11, 2005

Files: A73 566 992[1] – New York
A73 566 993

In re: GJINAL VEIZAJ
EVELINA VEIZAJ

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Pro se

ORDER:

PER CURIAM. The appeal is untimely. A Notice of Appeal (Form EOIR-26) must be filed within 30 calendar days of an Immigration Judge's oral decision or the mailing of a written decision unless the last day falls on

1. The complete record of proceedings in this case is not before the Board and attempts to have the record located and forwarded to the Board have been unsuccessful.

a weekend or legal holiday, in which case the appeal must be received no later than the next working day. *See* 8 C.F.R. §§ 1003.38(b), (c). In the instant case, the Immigration Judge's decision was rendered orally on January 8, 2001. The appeal was accordingly due on or before February 7, 2001. The record reflects, however, that the Notice of Appeal was filed with the Board of Immigration Appeals on March 5, 2004. We accordingly find that the appeal is untimely. In conjunction with the appeal, the respondents have filed a Motion to Accept Late Filing of the Notice of Appeal. The respondents request that this "Notice of Appeal be accepted as late because they hired an attorney to file the Notice of Appeal . . . ." The respondents further allege that the Notice of Appeal was not properly filed with this Board because "this individual is no longer an attorney because he withdrew his license to practice law." We are not persuaded by the contentions in the appeal statement to take this case on certification. The Immigration Judge's decision is therefore now final, and the record is returned to the Immigration Court without further action. *See* 8 C.F.R. § 1003.3(a), 1003.38, 1003.39, 1240.52, 1240.53, and 1241.31.

We note that because we have dismissed the appeal for lack of jurisdiction, either party wishing to file a motion in this case should follow the following guidelines: If you wish to file a motion to reconsider challenging the finding that the appeal was untimely, you must file your motion with the Board. However, if you are challenging *any other* finding or seek to reopen your case, you must file your motion with the Immigration

Court. *See Matter of Mladineo*, 14 I&N Dec. 591 (BIA 1974); *Matter of Lopez*, 22 I&N Dec. 16 (BIA 1998). You should also keep in mind that there are strict time and number limits on motions to reconsider and motions to reopen. *See* 8 C.F.R. §§ 1003.2(c)(2), 1003.23(b)(1); *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997).

s/ [illegible]
FOR THE BOARD

APPENDIX E — DEPORTATION PROCEEDINGS OF THE UNITED STATES DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, UNITED STATES IMMIGRATION COURT, NEW YORK, NEW YORK DATED JANUARY 8, 2001

UNITED STATES DEPARTMENT
OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
NEW YORK, NEW YORK

Date: January 8, 2001

In the Matters of

Gjinal VEIZAJ,
A73-566-992

Evelina VEIZAJ,
A73-566-993

- Respondents -

ON BEHALF OF RESPONDENTS
Law Offices of Vulaj and Marku, Esqs.
325 Broadway, Suite 300
New York, NY 10007

ON BEHALF OF SERVICE
Randa Zagzoug, Esq.
Assistant District Counsel
New York District

Appendix E

CHARGES: Section 241(a)(1) – A respondent who has remained in the United States longer than permitted.

APPLICATIONS: Request for asylum in the United States pursuant to Section 208 of the Immigration & Nationality Act, as amended.

Request for withholding of removal to Albania pursuant to Section 241(b)(3) of the Immigration and Nationality Act, as amended.

Request for voluntary departure pursuant to section 240 of the Immigration and Nationality Act, as amended.

Request for relief under Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), § 2242(b) of the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, Division G, 112 Stat. 2681 (Oct. 21, 1998); 64 Fed. Reg. 8478-96 (Feb. 19, 1999) (codified at 8 C.F.R. §§ 208.16 and 208.18) (eff. 3/22/99).

Appendix E

DECISION OF THE IMMIGRATION JUDGE

The respondents are husband and wife and are natives and citizens of Albania. The husband is 35 years of age and the wife is 30 years of age. The respondents, through counsel, had conceded the factual allegations in the Order to Show Cause and conceded deportability, *Exhibits 1A & 1B*. Therefore, the court finds that the respondents are deportable and that such finding is supported by clear, convincing and unequivocal evidence. The respondents declined to indicate a country in the event of deportation, the Service directed Albania.

As relief from deportation, the respondents have applied for asylum under § 208 of the Immigration and Nationality Act, as amended ("INA"), by filing Form I-589, see *Exhibit 2*. The female respondent did not submit an independent request for asylum but relies upon the husband application for asylum. The respondents' request for asylum is also considered a request for withholding of removal under § 241(b)(3) of the INA. The parties submitted background material for the court's review.

TESTIMONY

The male respondent was the sole witness to the proceedings. The husband testified that he was born on December 27, 1964 in Albania and that he left Albania on January 31, 1994. The male respondent testified that the problems that led to his departure began in 1973

when his family was sent to the Dragot (phon.) camp where they were detained and held in captivity because of their anti-Communist views. The male respondent testified that the conditions at the camp were rudimentary and harsh. The male respondent stated he and his mother remained at the camp for seventeen years until 1990 when a general amnesty was issued by the new Democratic Party government. The male respondent testified that his father was arrested and sentenced for 10 years for his anti-Communist activities. The male respondent testified that he joined the Association of Former Politically Persecuted Persons in an effort to regain the family losses incurred during the Communist reign. The male respondent completed 8 years of primary school and was required to do agricultural labor until the fall of Communist rule.

Respondent testified that under the new democratic rule he was able to obtain a job as a policeman after completing one year of specialized training. The male respondent served one year as a police officer. The male respondent testified that he understood that the Democratic Party was not really democratic and that it had obtained political control of the country by fraud. The male respondent also testified that in 1993 while serving as a police officer that he refused to carry out orders to suppress peaceful demonstrations. The male respondent testified that the demonstrations blocked traffic and cause disruption but hat the demonstrators were generally peaceful. For refusing to carry out orders, the male respondent testified that he felt that his life was in jeopardy. The male respondent testified

that he resigned his position and left Albania by going to Macedonia to get a visa to go to the United States. The male respondent had also testified that his father, when he went to press his claim for return of the family property, was beaten up by the police.

The male respondent testified that he fears returning because he will be arrested for his disobeyance of job orders and that the secret police still seeks his whereabouts. The male respondent also stated that the situation has not really changed since his departure and that the Socialist are really past Communist or the offspring of former Communists leaders.

ASYLUM AND WITHHOLDING CRITERIA

A respondent who is seeking a discretionary grant of asylum must demonstrate status as a "*refugee*" as denied by §101(a)(42)(A) of the INA. The definition includes the requirement that the respondent demonstrate an unwillingness or inability to return to his or her home country because of persecution, or "*well-founded fear*" of persecution, on account of race, religion, nationality, membership in a particular social group, or political opinion. The requirement is met by a showing of circumstances under which a reasonable person would fear persecution. *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

Accordingly, in determining whether a respondent is eligible for asylum, a respondent's subjective mental

state must be considered against the background of circumstances prevailing in the respondent's home country. The objective reasonableness of a respondent's fear can be based upon what has happened to others similarly situated, as reported in the Dept. of State, Country Reports on Human Rights Practice, or based upon other reliable sources. In some cases, the only available evidence of a respondent's subjective fears may be the respondent's own testimony. Such solitary evidence can suffice where the testimony is credible, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis of the respondent's fears. Finally, not just any fear of persecution will sustain the respondent's burden, the objective reasonability of persecution on account of a ground specified in §101(a)(42)(A) of the INA, and the respondent's subjectively reasonable fear of experiencing that persecution both must be established. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

The respondent bears the evidentiary burden of proof and persuasion in applications for asylum and withholding of removal. *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), *see also* 8 CFR 242.17(c)(4)(iii). In addition to establishing eligibility for a grant of asylum, a respondent has the burden of establishing that a favorable exercise of discretion is warranted. *Matter of Shirdel*, 19 I&N Dec. 33 (BIA 1984).

Where a respondent has shown that he or he has been persecuted in the past on account of race, religion, nationality, membership in a particular social group, or

political opinion, the likelihood of present persecution becomes relevant with regard to the exercise of discretion, and asylum can be granted, or denied, in the court's discretion even if there is a little likelihood of present persecution. *Matter of Chen*, Int. Dec. 3104 (BIA 1989).

A respondent who is seeking withholding of removal from any country must show that such respondent's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion. See §243(h)(1) of the INA. In order to make this showing, the respondent must establish a "clear probability of persecution on account of one of the enumerated grounds." *INS v. Stevic*, 467 US 407 (1984). This clear probability standard requires a showing that is more likely than not that the respondent would be subjected to persecution. Under the Refugee Act of 1980, withholding of removal is mandatory. Therefore, once the respondent has established qualification for withholding, and that he or he is not ineligible, it must be granted and the respondent cannot be returned to the country where he or he would face persecution. The respondent may, however, be deported to another country under certain circumstances. In this regard, withholding of removal differs from asylum, which the granting is discretionary.

As for withholding of removal under CAT, the respondent needs to demonstrate past torture or that it is more likely than not that the respondent would be tortured if forced to return.

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ANALYSIS

The respondents assert they have suffered past persecution due to their political activities and beliefs. Respondents also assert that they have a well-founded fear of future persecution because of the male respondent's refusal to carry out job orders against peaceful demonstrators. As to the issue of eligibility for relief, it is the opinion of the court that the respondents are not entitled to asylum. The court found the male respondent's presentation to be inconsistent and conflicting when compared with his written addendum attached to the application for asylum, *Exhibit 2*. The conflicts and inconsistencies are material and go to the essence of the respondent's claim of persecution. As such, the court did not find the respondents' claim to be credible or believable. Examples of the material inconsistencies are as follows. The respondent orally testified that he left his police officer position because he had refused to carry out orders against peaceful demonstrators. The respondent stated in his written addendum to the application that he left before his superiors would discover his past as a politically persecuted person. Moreover, the written application is totally devoid of any information as to the respondent's refusal to carry out orders against political demonstrators. The respondent's explanation regarding the conflicts were not convincing or persuasive. The male respondent has also stated in his oral testimony that he received a "cold reception" when he reported for duty as a police officer since they knew of his adverse political past. Also adverse to the male respondent's credibility

was his failure to mention his family's camp internment in his written addendum. He also makes no mention in his written addendum concerning the treatment his father had experienced when he went to the government offices to press the family's claim for return of their property taken by the Communist.

Moreover, there has been a substantial change of circumstances in Albania with the fall of the Communist rule. The male respondent had testified that the Democratic Party was in power as a result of fraud, but presented no corroboration for his testimonial assertion. Based upon the background material, especially the Dept. of State Country Reports on Human Rights Practices ("Report") in Albania for 1999 (*Exhibit 7*) it indicates that the Democratic Party had been elected by the people in a popular referendum. Also the court did not see a causal connection that the Socialist were the Communist as asserted by the male respondent. The Report also paints a different political picture than that asserted by the respondents. The Profile, *Exhibit 6*, at p.2 under §1(a) states that "*[t]here are no confirmed cases of political killings by the Government . . . .*" The report also states that Albania continues to experience high levels of violent crime. The Report states that there were no confirmed reports of political motivated disappearances (p.3) and no reports of political prisoners, (p.6). It is clear that the respondents have failed to meet their burden of demonstrating persecution or a well-founded fear of persecution. There is also no evidence of a well-founded fear of future persecution.

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The court is constrained to deny the respondents request for asylum. As respondents have failed to meet the burden for asylum, they have also failed to meet the higher standard of proof for withholding of removal.

The respondents have also failed to demonstrate eligibility for withholding of removal under CAT. There was no evidence of any torture or that the respondents would experience any torture if forced to return.

Accordingly, the following orders will be entered:

ORDER

ORDERED that the respondents' request for asylum under §208 of the Immigration & Nationality Act be and the same is hereby denied;

ORDERED that the respondents' request for withholding of removal under §241(b)(3) of the Immigration & Nationality Act be and the same is hereby denied;

ORDERED that the respondents' request for withholding under CAT be and the same is hereby denied;

ORDERED that the respondents be, in lieu of an order of removal, granted voluntary departure without any expense to the United States Government up to and including March 30, 2001, or any extension beyond such date as may be granted by the District Director and under such conditions that the Director shall impose;

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ORDERED, if respondents fail to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or further proceedings, and the following order shall become immediately effective: Respondents shall be deported from the United States to the Albania based upon the charges contained in the respective Order to Show Causes.

s/ Sandy K. Hom
SANDY K. HOM
U.S. Immigration Judge